Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

WILLARD JENKINS SR. [pro se]

Petitioner,

v.

BRUCE BABBITT
DEPARTMENT OF INTERIOR [Sect]

Respondent.

On Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Ninth District

Willard Jenkins Sr.*
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* [pro se]

74RP

QUESTION(S) PRESENTED FOR REVIEW

I. WHETHER THE NINTH CIRCUIT COURT OF APPEAL ABUSED ITS DISCRECTION, WHILE REVIEWING MY COURT TRIAL CASE; THAT THE DISTRICT COURT MADE AN ERROR OF LAW IN JUDGEMENT FOR THE APPELLEE, ON WHICH RAISES THE DISPARATE IMPACT, DISPARATE TREATMENT, RETALIATION, AND AGE DISCRIMINATION IN EMPLOYMENT FOR EXPECTED SERVICES, VETERAN REAJUSTMENT ACT (VRA) AND COMPETITIVE SERVICES SELECTIONS; AND AWARD OF THE COURT COST WHILE APPELLANT WAS IN "IN FORMA PAUPERIS STATUS", APPROVED AND ORDERED BY THE COURT.

II. WHETHER THE NINTH CIRCUIT COURT OF APPEAL ABUSED ITS DISCRECTION BY DENYING ME DUE PROCESS BY REFUSING TO REVIEW THE JURY TRIAL PART OF MY FEDERAL CIVIL RIGHTS CASE, PROCESSED BY THE DISTRICT COURT UNDER TITLE VII CIVIL RIGHTS ACT, FOR CLAIM OF FAILURE TO PAY APPEAL FEES.

III. WHETHER THE APPELLANT VIOLATED MY CIVIL RIGHTS WHEN THEY REFUSED TO EMPLOY ME SINCE DECEMBER 1989.

IV. WHETHER THE APPELLANT IS ENTITLED TO A NEW TRIAL ON NEW EVIDENCE UNCOVERED DURING THE DISTRICT COURT TRIAL. "DESTRUCTION OF SELECTIONS PROCESSING DOCUMENTATION BEFORE TIME PERIOD ENDED". AND CONDUCT OF THE OPPOSING ATTORNEY, IN PLEADING VARIANCE BEFORE A JURY.

LIST OF PARTIES

Willard Jenkins Sr
Department of Interior
(Bruce Babbitt, Sect)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Willard Jenkins Sr., respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

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JURISDICTIONAL STATEMENT

The judgement of the court of appeals was entered on Jan 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This appeal raises the disparate impact, disparate treatment and retaliation provisions of Title VII, 42 U.S.C. § 2000e-3 and 2000e-5, made applicable to Fish and Wildlife services and the Bureau of Reclamation through 42 U.S.C §2000e-16, (VRA) Veteran Readjustment Act 38 U.S.C § 4214 (B) (2) (A) 6, VPA , 5 U.S.C.§ 2108, which provides a legislatively-sanctioned preference to qualifying veteran which encompasses, among others, disabled veterans and veterans who served on active duty in the armed forces for more than 180 consecutive days between 1955 and 1976. 5 U.S.C. § 2108. In addition, this appeal raises the age discrimination provisions of the age discrimination in employment Act, 29 U.S.C § 621 et seq. Finally, challenge to the award of costs, 28 U.S.C. § 1920.

Fifth Amendment: Denied Due Process and Protection of the federal law by the Ninth Circuit Court of Appeal who refused to consider any issues raised in Appellant brief that address the jury trial on claim for failure to pay docket fees. Refusing to hire me since December 1989 via the VRA Act or the Competitive Selection Process

STATEMENT OF THE CASE

I

Appellant\Plaintiff's complaint is for unlawful discrimination based on theories of disparate treatment, retaliation and disparate impact. He is entitled to relief as provided under Title VII, the Age Discrimination in Employment Act, and Veterans Readjustment Act (Disabled).

II

Appellant\Plaintiff's was denied due process and protection of the law base of the Ninth Circuit Court appeal inconsistent opinion, abuse of process not reviewing part of Appellant case for claim of failure to pay appeal fees.

III

In the District Court I presented evidence which shows that the Appellee\Defendant follows a hiring policy which appears factually neutral. The policy is one which permits a "selecting official" to selectively choose from "certified" applicants for positions. Applicants are certified as qualified by trained personnel staff. Plaintiff, a black male, was certified as qualified for the positions of computer specialist with the Fish and Wildlife Services (FWS) and supply clerk with the Bureau of Reclamation (BoR). In each instance the selection official was a white male. In each instance a white male was hired.

In each instance the selecting officials conducted interviews and rated the applicants according to

certain factors. The factors bore no relationship to the knowledge, skills or abilities (herein "KSA's") required for the positions. See SER[1] 13-16 Excerpts of Trial Transcript and Interview Questions and Results Sheet of court trial. Each selecting official developed his own Interview Questions and Computation Sheet. Each selection official developed his own system of rating applicants. In each instance a while male currently employed by the government was selected.

This system has the effect of preserving the racial imbalance of the defendant. The fact of the existence of a racial imbalance and its perpetuation is clearly established by various internal reports of the defendant. For your review, SER 23-42, Excerpt of Appellee Brief Procedural Facts, page 11; Declaration of EEO Curtis Smith SER 39-42. These reports show a "conspicuous absence" and "manifest imbalance" of black males in the positions in question.

The action of each selecting official are classical examples of hiring based upon subconscious stereotypes of an individual of a particular cultural and racial background. Because of the very nature of the "facially neutral" method of selection, persons of cultural and racial backgrounds similar to those of the hiring official received preference. Just as certainly, a person who presents a dissimilar cultural and racial background is given lesser rating by the selecting official.

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[1] "SER" refers to appellee's Supplemental Excerpts of Record. Citations are to the page number, unless otherwise stated.

Thus, when the selecting official used a purely subjective method for ranking interviewees he chose a white male "just like me". Accordingly, the selecting officials for the BoR supply clerk position, Dean Malone, is totally unable to justify his method of scoring has been characterized as "discriminatory" by government employee Curtis Smith, and EEOC specialist. Malone says he rated the applicants on the way he felt about them as an "overall man".

The questions Malone asked have little or nothing to do with the KSA's required for the position. (See court trial Exhibit '38", SER 13-15, for your review). The reasons he gives in support of his ratings are totally spurious and pretextual. Malone basic reason for choosing the selectee is that the selectee scored better on the interview than the other candidates, and the selectee already worked for the company, in a similar warehouse. Jenkins was more qualified for the position. Malone is totally without qualifications or training as a selecting official.

The second selecting official is James McKevitt. He was the selecting official for the FWS (Fish & Wildlife Service) computer specialist position. McKevitt is more sophisticated. The defense turns on the credibility of this witness. McKevitt has some training in personnel. He first advertised for the vacancy only within the government. He was not satisfied with the candidates he received as a result of the advertisement. He then authorized a broader recruitment. McKevitt requested the Office of Personnel Management (OPM) to certify applicants for the position.

OPM certified the names for the computer specialist position. OPM rated Jenkins first among the three applicants. McKevitt did not interview any of the three applicants certified by OPM. On August 10, 1992, McKevitt interviewed James Turner, a 37-year-old white male. McKevitt selected Turner who was hired on August 17, 1992.

A careful review of Jenkins' application reveals he is a black male. (1) He was born in Jennings, Louisiana; (2) he was named Warlow, a name he changed to Willard; (3) he attended Grambling University from 1958-59; and (4) his application was stated as required by (FOPM) Federal Office of Personnel Management. The combination of these factors would reveal to a person of McKevitt's background that the applicant was most likely a black male. Jennings is a rural village on the fringe of the Mississippi delta.

Warlow is a common name for black males. It is general knowledge that Grambling is a black college. McKevitt admitted he was aware of this during his deposition. Further, McKevitt follows professional football. Grambling is known among pro-football followers as a black college with more professional players than any other alumni. Despite this, McKevitt denies that he knew of Jenkins' race.

McKevitt did not interview any OPM candidates. He has offered numerous and varying justifications for not interviewing Jenkins. (1)McKevitt states that the person he hired did better on the interview. However, McKevitt returned the

OPM list with Jenkins' name on it four days before interviewing the selectee. Further, the person hired did not receive the highest score on the interview. (2) McKevitt states that he did not receive the OPM applications in time. However, they were delivered at the same time as all the applicants. (3) McKevitt decided to hire from within the government. But, if this is true, why even bother to ask the OPM for certifications? (4) McKevitt states that Jenkins' application was the worse he had ever seen. McKevitt first proffered this justification during his deposition almost four years later.

Defendant continues to justify McKevitt's action by asserting that Turner, the selectee, was about to lose his job, and that Jenkins could have submitted his application directly to FWS and not through OPM. These justifications only added to the unplausible reasons of why Jenkins was not interviewed. McKevitt's reasons for not interviewing Jenkins are presented at different places and times as the situation arises. These circumstances cast serous doubt upon his credibility which ring clear. For your Review See SER 35-38. Declaration of James J. McKevitt, dated 8/25/95.

McKevitt prepared a suspicious list of factors he considered with respect to the eight (8) candidates he did interview. He ascribed a numerical value to each factor. McKevitt assessed point for each category i.e. "Overall years of computer experience" one (1) point for each year; "PC experience", one point for each year; "Education" one (1) point for associate's degree, and four (4) for a doctorate; "other computer

training" on a scale of zero (0) to five (5); "work history/background" on a scale of zero (0) to five (5); "appraisals", "interview" and "intuition" on a scale of one (1) to ten (1) each. The categories of "appraisals", "interviews" and "intuition", are subjective. They do not measure the knowledge, skills and abilities of the applicant.

McKevitt did not evaluate Jenkins by the same method he used to evaluate the other applicants. Jenkins' application discloses overall experience with computers of 320 months; that he had over 15 years experience with PC's; education the equivalent of an associates degree, at least the equivalent of Turner; and a work history of 26 years, the last 6 of which were in the private sector in Saudi Arabia. By any objective standard, Jenkins' application should be rated as follows:

1. Overall Computer Experience (SF171 shows 320 Mos.)
   26
2. P. C. Experience
   15
3. Education (2 years Grambling + Continuing Ed. USAF)
   2
4. Other Computer Training (substantial In-service Training)
   2
5. Work History/Background (20 Years USAF; 6 yrs. Northrop)
   5
6. Appraisals
   0

7. Interview
   0
8. Intuition
   0
TOTAL 50

Jenkins' computer experience began with punch cards in the 1960's and progressed through the development of the Personal Computers. He was employed as a computer specialist through 1986 in every aspect of the work described in McKevitt's job description. He continued his formal education at National University. He was truly a candidate any administrator interested in fairness would have, at the very least, given an interview. On paper, at least by OPM standards, he was the most qualified candidate. Even measured by McKevitt's interview standards he was still the most qualified. However, McKevitt wanted to help a white male whose job was being eliminated. He used the system to accomplish and justify this goal. That is why he declined to interview Jenkins, a black male.

McKevitt made note of the ethnicity of the candidates interviewed. This is apparently for statistical purposes. The defendant's personnel procedures provide that unless he interview any. By refusing to interview the OPM candidates, he did not have to report awareness of their ethnicity.

There is no credible explanation for McKevitt's refusal to interview Jenkins. Jenkins had qualification equal to or in excess of Turner, including veteran's preferences. Why did McKevitt not

interview Jenkins? If he manufactures a new reason each time he is asked, one can only infer his real reason is undisclosed. Certainly he could not disclose a desire to discriminate against Jenkins because he is a black male, over forty, or to retaliate against him for his prior EEOC complaint as to the BoR supply clerk position.

McKevitt is much to sophisticated for such a blunder. His sophistication in giving "factually neutral' but implausible explanations betray the reality. He did not want to interview the OPM candidates because the leading candidate was a black male. This is the only explanation consistent with his desire to hire a white male whose job was being eliminated. This motivation was an intentional discrimination against Jenkins! The conduct of defendant in the manner in which he treated the application Jenkins did constitute disparate treatment of Jenkins because he is a black male over forty and retaliation.

During the relevant time period, there was a disproportionately low percentage and conspicuous absence of black males employed with the Department of Interior, and specifically with the BoR and the FWS. There is a conspicuous absence of black males employed in professional and technical positions with the Department of Interior, FWS. The position of computer specialist is a professional or technical position as defined by the Department of Interior. The interview and selection methods authorized and permitted by defendant, and which were used by persons such as

Malone and McKevitt, are the causes for the disproportionately low percentage of minorities. The hiring policies and procedures of the defendant, as administered, results in a conspicuous absence of black males in positions for which plaintiff applied.

The interview and selection methods authorized, permitted,and used by defendant did result in disparate treatment of and a disparate impact upon Jenkins. Plaintiff is entitled to relief. (1) Jenkins is a member of a protected class (black male); (2) Jenkins is qualified for the job; (3) that despite his qualifications, he was rejected; and (4) that the position remained open and was ultimately filled by a person who is not a member of a protected class. *St. Mary's Honor Center v. Hicks*, **509 U.S. 502, 506 (1993);** *McDonnell Douglass Corp. v. Green*, **411 U.S. 792, 802 (1973);** *Nelson v. Pulaski County Sheriff's Department*, **859 F. Supp. 1228, 1231 (E.D. Ark 1994). Plaintiff also presents a prima facie case of age discrimination as to the FWS computer specialist position in that the plaintiff was over forty at the time he applied, he was qualified, but not selected, and another person under forty was selected. 29 U.S.C. 633a (prohibition of age discrimination in federal personnel decisions);** *Merrick v. Farmers Ins. Grp.*, **892 F.2d 1434, 1436 (9th Cir. 1990) (disparate treatment claims under the Age Discrimination in Employment Act are analyzed in the same manner as disparate treatment claims under Title VII).**

Appellee\Defendant's justification for Appellant\Plaintiff's non-selection for the FWS computer specialist position and the BoR (Bureau of

Reclamation) supply clerk position are pretextual. The evidence does, at the very minimum, give rise to the inference that purposeful discrimination is the true reasons for his non-selection. The deposition of McKevitt and the recorded statement of Malone in particular circumstances of this case shows that neither is credible. For that same reason the appellee did not call them to court as promised to the court. Their reasons are not supported by fact, particularly those of McKevitt. They are false and pretextual. The statistical data and the defendant's own studies establish the element of disparate treatment and impact. Defendant, through its agents, have purposefully discriminated against Jenkins on the basis of race, national origin and age. The records reveal that since 1989 Jenkins was not given employment via the VRA or Competitive Services. For your review certification of Michael R. Finnegan, Exhibit 33. See Ser 19-22, Certification and Excerpt of court trial transcript.

A. Disparate Treatment

In order to prevail on a theory of disparate treatment, plaintiff must present a prima facie case of discrimination. The burden then shifts to the defendant to provide a legitimate non-discriminatory justification. If the defendant meets this burden, the burden shifts back to the plaintiff to show that the pre-offered reason was a pretext for unlawful discrimination. *McDonnell Douglas Corp. v Green* 411 U.S. 792, 807 (1973).

For disparate treatment, the plaintiff must

prove that the defendant acted with a discriminatory intent. *EEOC v Exxon Shipping Co.*, **745 F.2d 967 972 (fth Cir. 1984). However plaintiff can prove intentional discrimination where there is a sufficient showing of disparity between the plaintiff's class and members of the majority group.** *Palmer v. Schultz*, **616 F.2d 1249, 1265-66 (D.C. Cir. 1984),** *cert. Denied sub nom.*, **471 U.S. 1115 (1985). Further intentional discrimination can be inferred from circumstantial evidence such as "[1] suspicious timing ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn... [2] evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) or which an employer is forbidden to base a difference in treatment received systematically better treatment,... [3] evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination."** *Troupe v. The May Department Stores Co.*, **20 f.3d 734, 736 (7th Cir. 1994).**

In regard to race and national origin discrimination, the evidence will show that: (1) Jenkins is a member of a protected class (black male); (2) Jenkins is qualified for the job; (3) that despite his qualifications, he was rejected; and (4) that the position remained open and was ultimately filled by a person who is not a member of a protected class. *St.*

Mary's Honor Center v. Hicks, **509 U.S. 502, 506 (1993);** *McDonnell Douglass Corp. v. Green*, **411 U.S. 792, 802 (1973);** *Nelson v. Pulaski County Sheriff's Department*, **859 F. Supp. 1228, 1231 (E.D. Ark. 1994). Plaintiff also presents a prima facie case of age discrimination as to the FWS computer specialist position in that plaintiff was over forty at the time he applied, he was qualified, but not selected, and another person under forty was selected. 29 U.S.C. 633a (prohibition of age discrimination in federal personnel decisions);** *Merrick v. Farmers Ins. Grp.*, **892 F.2d 1434, 1436 (9th Cir. 1990) (disparate treatment claims under the Age Discrimination in Employment Act are analyzed in the same manner as disparate treatment claims under Title VII).**

Defendant's justification for plaintiff's non-selection for the FWS computer specialist position and the BoR supply clerk position are pretextual. The evidence does, at the very minimum, give rise to the inference that purposeful discrimination is the true reasons for his non-selection. The deposition of McKevitt and the recorded statement of Malone in the particular circumstances of this case show that neither is credible. Their reasons are not supported by fact, particularly those of McKevitt. They are false and pretextual. The statistical data and the defendant's own studies establish the element of disparate treatment and impact. Defendant, through its agents, have purposefully discriminated against Jenkins on the basis of race, national origin, age and specific disability.

B. Retaliation

It is unlawful for an employer to retaliate against an employee or applicant because the employee or applicant opposed an unlawful employment practice, or participated in an investigation, proceeding, or hearing under Title VII. 42 U.S.C. § 2000e-3. In order to prevail on a claim for retaliation, plaintiff must first prove that (1) he engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) that adverse action by the employee occurred subsequent or contemporaneously with the activity; and (3) that there is a causal connection between such activity and the employer's action. *Kenall v. Watkins,* **998 F.2d 848, 850 (10th Cir. 1993) (quoting** *Love v. RE/MAX of Am. Inc.,* **738 F.2d 383 (10th Cir. 1984). Once the plaintiff has established these elements, the burden shifts to the defendant "to articulate a reason for [its actions] that is not, on its face, prohibited by Title VII."** *Kendall, supra,* **at 85.**

The evidence does meet this burden of proof that Jenkins has been denied employment since 1989. For your Review, Excerpt of Court Trial transcript and certification of Donald W. Titus, dated 2/27/92, SER 62-67. After his rejection for the supply clerk position with the BoR, Jenkins filed and pursued an administrative complaint with the EEOC, and activity that is protected by Title VII. He then applied for the computer specialist position at the FWS. The circumstances suggest McKevitt learned of Jenkins's EEOC complaint. While this inference is not strong, it is quite arguable. Defendant has significant

exposure on this point and is receiving retaliation for exercise of rights. (*Cert: N.D.N.Y.* 1993 to establish that activity is protected under Title VII, employment discrimination plaintiff claiming retaliation need not prove merits of underlying discrimination complaint, but only that plaintiff was under good faith, reasonable belief that violation existed. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et* seq. - *ANDERSON v. S.U.N.Y. Health Center at Syracuse*, 825 F. Sup. 625.

C. Disparate Impact

Defendant's counsel did not realistically consider their client's exposure on the theory of disparate impact. Plaintiff's counsel believes the evidence strongly suggests the presents of a system, which, through de jure is facially neutral, does, de facto, perpetuate discrimination against blacks.

The elements for disparate impact are (1) that there is a facially neutral employment practice; (2) which as a disproportionately harsh effect on members of a protected class; and (3) which cannot be justified by business necessity. *American Foundation of State, County and Mun. Employees, AFL-CIO v. Nassau County*, 609 F. Sup. 695, 711 (E.D.N.Y. 1985); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). In *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977 (1988), the United States Supreme Court recognized that a claim of disparate impact can be based on "subconscious stereotypes and prejudices." *Id.* At 990. The interview and selection procedures employed in this case are examples of

how such subconscious stereotypes and prejudices perpetuate a disproportionate representation of members of the protected class of which Jenkins is a member.

According to 1990 census data, African-Americans make up 9.00% of the population of Sacramento County. A chart obtained from the California Department of Finance, Demographics Research Unit, utilizing 1990 census data, illustrates the racial make-up of Sacramento County by job category. For your Review See Appendix J, Appellee Affirmative Employment Program for Minorities and Women.

Plaintiff proposes that the supply clerk position for the BoR would be categorized as either "Administrative Support Occupations" or " Handlers, Equipment, Cleaners, Helpers and Laborers" on the attached chart. Under either classification, the evidence illustrates that African-Americans are grossly under-represented at the BoR.

The percentage of African-Americans in the Sacramento labor market for "Administrative Support Occupations" is 9.19%, and African-Americans make up 9.55% of the Sacramento labor market for "Handlers, Equipment Cleaners, Helpers and Laborers." In contrast, African-Americans make-up only 6.5% of the clerical work-force of the BoR[2].

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[2]Notably, the Bor relied on 1980 census data in determining that blacks were not under-represented at the

These statistics clearly shows that there is a significant discrepancy between African-Americans in the relevant labor make-up and those holding clerical positions at the BoR. Next we turn to the FWS computer specialist position. A chart prepared by defendant, and provided to plaintiff during discovery with explanations of its significance, indicates that at the time Jenkins applied for the position, there were only four (4) African-Americans employed by the FWS out of ninety-two (92) employees.[3] This amounts to only 4.34% of the FWS staff being African-American. In contrast, African-Americans makes up 7.55% of the total work force in the Sacramento area.

Furthermore, defendants own internal EEOC investigative reports illustrate that from the years 1988 to 1995 there has been a "manifest imbalance" and/or conspicuous absence" of black males in both types of positions for which Jenkins applied. The discrepancy in professional and technical positions is particularly glaring.

Plaintiff has amply demonstrated through statistical data and the EEO's own independent affirmative action reports that African-Americans are under-represented in positions for which Jenkins applied. This under-representation is a result of the

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Bor, despite the fact that such an analysis was conducted in 1991.

[3]Of the four African-American employees, three(3) were female, and one (1) was male.

complete discretion that the selecting officer is given and the tendency that the selecting officer will select a person most like him, thus acting on subconscious stereotypes and prejudices. Strong evidence will support a finding of disparate impact. Declaration of Louis N. Desmond and judicial notice, SER 68-86. The defendants are exposed to serious liability on this point and facts that concerning the Plaintiff/Appellant has been denied employment since December 1989, by the Defendant\Appellee and are still maintaining Application for employment over a year old for the Appellant\Plaintiff. With respect to black males in the subject positions. This "Conspicuous Absence" and "Manifest Imbalance" does not come from the certification process. At the certification level, professional personnel staff makes the determinations. There is no question but what they send out for selection is a racially diversified group of applicants. The next step in the process results in the final selection. This is not a process of interviews by trained personnel specialists. Rather, the evidence shows that it is a process that permits development of meaningless interview standards by untrained selectors who justify selections based upon their subconscious stereotypical biases and prejudices. SER 87-94, Declaration of Dora Bertain, Dated Apr 5, 1997.

IV

D. Denied Due Process

Appellant\Plaintiff's was denied due process and protection of the law base of the Ninth Circuit Court appeal inconsistent opinion that to not review part of Appellant case. Initially I was permitted to file

without cost or payment, or pay later (in forma pauperis status, ser 95-97, by United States District Judge William B. Shubb, Apr 6, 1995; and ser 98-100 by Garland E. Burrell, Jr., United States District Judge), which was removed by the Ninth Circuit Court upon appellee demands.

Then I was ordered to pay for transcripts and pay docket fees in which I paid— ser 101-108. I am a Disabled Veteran and my complaints were discrimination under Title VII and by law should not be required pay, "cost" especially when the court assigned attorney ran up the bill, not me. Beside the cost is incorrect and were not necessarily incurred actually in this action.

REASON FOR GRANTING THE PETITION

The District Court and Ninth Circuit Court of Appeal error of law; whereas in the District Court, I presented evidence that stated a prima facae case of discrimination. Whereas, I showed that the Department of Interior was servicing and maintaining a system that discriminated against Blacks. (Cert: Maintenance of discriminatory hiring policies is continuing violation actionable under 42 USCS § 2000e-5. *Ligon v Frito-Lay, Inc.* (1979, ND Tex) 82 FRD 42, 19 BNA FEP Cas 312). That they had and imbalanced workforce and the selection process they used was purely subjective, using prohibited personnel practices in violation of 5 U.S.C. § 2302. That they refused to hire me since Dec 1989, and maintained my application which is five years old or older. (Cert: Employer's retention of plaintiff's application for 9 months following his initial application provides basis in fact for alleged failure to hire throughout 9-month period in action under 42 USCS § 2000e-5. *Din v Long Island Liaghting Co.* (1979, ED NY) 463 F Supp 654, 18 BNA FEP Cas 1552, 19 CCH EPD ¶ 8988). They refused to hire me under VRA although I have applied and was promised to be considered for the more than 30 open posted announcements by the Appellant. I also showed retaliation and denial of due process and statute violations.

- Refusal to hire and the

- Continuing Violations has cause me: Mental suffering, emotional distress, humiliation, and embarrassment. *D.Neb.* 1993. Compensatory damages are designed to compensate plaintiff for such injuries as impairment of reputation, personal humiliation, mental anguish and suffering. 42 U.S.C.A. § 1983. - *Bruhn v. Foley*, 824 F.Sup 1345.

According to Title VII as amended in 1991, the statute is

not violated under a theory of disparate impact unless the complaining party demonstrates a "particular" employment practice causes a disparate impact. Ordinarily this means that a plaintiff must point to a specific practice that is a component of the employer's decisional process, such as a test or an experience requirement, rather than to the decisional process as a whole. Nonetheless, the law provides that the entire decisional process may be analyzed as one practice if the complaining party can demonstrate "that the elements of a respondent's decision-making process are not capable of separation for analysis."

Contrary to the belief of some,[4] these principles are probably not a change in the law as articulated in Wards Cove. True, the Court did stress the need to articulate specific practices. But the most obvious example of a decision making process that is "not capable of separation" is one in which the decision making is entirely subjective as in SER 1-16.

The Ninth Circuit Court of Appeal refused to review the jury trial part of my case, of claim 'for failure to pay appeal fees', is an abuse of process since I was in touch with the court and following their directions. I informed them which is concisely stated as follows: Fact 1: On Dec 27, 1999, I paid the fees ad directed by Court $105.00, as it was determined by

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[4] See, e.g., remarks of Congressman Clay, 137 Cong. Rec. H9,539 (daily ed. Nov.7, 1991), in which he expressed the view that the Court in Wards Cove took the "wholly unreasonable position" that a plaintiff must separate an employer's decisional process into components even when that process was incapable of such separation. In fact, the Court had said not such thing.

the District Clerk, she stamped the order (SER 103), and gave me a receipt which I have attached to Order as SER 102.

Fact 2: On December 27, 1999, I mailed a memo to Cathy Catterson, cc EXCC with proof of payment fees. See SER 101, Certified Mail Return Receipt.

Fact 3: On January 3, 2000, after trying tot pay the transcript fees without success because no one would collect it, I certified a memo and mailed $1,500.00 to Court in care of Clerk responsible for the transcript. SER 106-107.

Fact 4: On March 1, 2000 after I discovered that part of the jury trial transcript was missing, I requested it and was told I would have to pay an additional $300.00, which I immediately mailed. SER 105.

Fact 5: All other documents that I received from the court and the Appellee shows that assigned docket No. 99-16720 was the main number of the complete case and was used as such; for example On motion October 21, 1999, in the (Excerpt) of Defendant/Appellee, Babbitt's response to Plaintiff/Appellant Jenkins' response to notice for payment of fees on page 1, the Defendant/Appellee states the following: "[1]Ultimately, this Court denied the motion as moot and dismissed the appeal as it appeared to be interlocutory in nature. Order entered September 16, 1999, in *Jenkins v Babbitt*, Nos 99-16571, 99-16573, 16575 (9th cir.)."

" [2]Jenkins has filed six notices of appeal, which have been assigned docket numbers 99-16571, 99-16573, 99-16575, 99-16720 and 99-16724. The first three appeals were dismissed by Order and entered September 16, 1999. See n.1 supra. By Ordered entered August 13, 1999, the latter two appeals were consolidated as *Jenkins v Babbitt*, No. 99-16720 (9th Cir.), and

remain active. The court may wish to consolidate the instant appeal with *Jenkins v Babbitt*, No. 99-16720 (9th Cir.)."

Fact 6: On November 3, 1999, excerpts of the Defendant/Appellee Babbitt's response to Plaintiff/Appellant Jenkins motion for court payment of counsel and Defendant/Appellee Babbitt's counter motion to dismiss states the following: " [2]Nos. 99-16571, 99-16573 and 99-16575 were dismissed as premature by Order entered September 16, 1999; Nos 99-16720 and 99-16724 were consolidated by Order entered August 13, 1999; and No. 99-17116 was dismissed for lack of jurisdiction by Order entered October 22, 1999." Exhibit "6."

For your review, SER 44-67, which shows that I applied for VRA employment since Dec., 1989 and was refused. See Exhibit 112, Certification of Donald W. Titus; and SER 62-67, Exhibit 113 Vacancy Announcement.

The Civil Rights Act of 1964 requires employers to give employment opportunities to persons of like qualifications irrespective of their sex, age, race, national origin and Disability. The Agency refused to hire me since Dec. 1989 by VRA ACT process and Competitive Service process.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORIA SHOULD BE GRANTED

In order to prevent injustice and further damage to my Civil Right and the Civil right of those other persons whom are unable but want to complain about a discriminatory system that is being maintained and services and also to prevent further injury from the court for failing to review all of my case and since to deny me due process is a violation of the Fifth amendment.

CONCISE RULE OF LAW: It is not a violation of the Equal Protection Clause to give veterans preference for jobs.

Discrimination Because of Race, Color, Religion, Sex, or National Origin

Sec. 703. (a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. (b) it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national

origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Thus, while this burden is only one of production and not persuasion, it is elementary that the evidence produced must be clear, reasonably specific, and legally sufficient to justify a judgement for the defendant if not disproved by the plaintiff. If the employer fails to carry this burden, the plaintiff is entitled to judgement as a matter of law. Through this action the Defendant/Appllee has refused to defend.

If there is a statistical showing of adverse impact, this constitutes a prima facie case of discrimination. And the employer must then show that its selection procedures are job related; and This requires more than good-faith belief that a particular procedure or selection criterion is relevant to successful job performance. There must generally be evidence that: the job has been professionally studied: the knowledge, skills and abilities. Thus, any criterion that is no manifestly job related is highly undesirable if it causes or may be suspected of causing adverse impact. Also, standard to the job may be sources of trouble where adverse impact is present. And The Supreme Court has ruled in *Connecticut v. Teal*, 457 U.S. 440 (1982), that the proper way of measuring adverse impact is to determine the actual effect of selection procedures rather than to use the bottom line as a measure of whether overall results are reasonably related to external availabilities.

I was a victim of unlawful discrimination, denied due process of Agency Regulation, Agency Law, Federal Statutes and EEOC violation,, and of VRA terms and preferences and was subjected to Prohibited Personnel Practice, when the Defendant's Agency Bureau of Reclamation, F&WS located in

Sacramento, Ca., used an assortment of adverse discriminatory practices, and Civil Rights violations, during selection process, in order to deny me Equal Employment Opportunity, evidently because of my race, sex, age, nation origin and handicap, during the time when I applied for open Vacant Announcements and a VRA on November 7, 1990. Since then this agency has created an unfavorable file on me and has passed-it to other Federal Agencies, who also has refused to hire me and are retaliating against me and my family because I filed the subject EEOC 'unlawful discrimination complaint under Title VII.

Whereas, I am highly qualified and a Veteran with two Vietnam Campaign Badges, Disabled Veteran Status, 20 honorable years military services, Air Force Retired. I have contacted the Personnel Section at the BoR on many occasions for employment and was refused, I know it was because of the subject reason as I have stated in my complaints. My application was rejected, I was not hired and the agency's employer destroyed some of my applications, which is in violation of the FOPM instructions as described in my complaint. And when I complained to the EEOC the agency retaliated in many ways causing untold damages, mental anguish and suffering, also causing IRS audit and troubles.

With respect, I pray that my case will be judged in my favor as a matter of law; or that this court will return it back to the District Court for a new trial or a suitable judgement. As I read about the Concise Rule of law , its my understanding that "where a trial judge sits without, a jury, a federal appellate Court may review a finding of fact where it

is determined that his finding must rest exclusively on written evidence or undisputed facts, so that his evaluation of credibility has no significance." And a federal trial judge may, in his sole discretion, set aside a jury verdict and grant a new trial where he finds the verdict is (1) contrary to the clear weight of the evidence. Especially in this case whereas in the jury trial the Defendant/Appellant committed a violation of variance pleading to which influenced the jury decision. The Defendants had already admitted in their answer. Original filed Jun 20, 1995. SER 109-111, page 9, line 7, "Defendant admits that plaintiff was qualified" for the position of Computer Specialist." It is to any understanding that admission is binding.

I thank you'll in advance.

Respectfully submitted,

Willard Jenkins Sr.*
7784 Antelope Road
Citrus Heights, CA 95610
(916) 722-7945
* [pro se]

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. CASE NUMBER: CIV S-95-643 WBS

BRUCE BABBITT

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT ENTERED IN ACCORDANCE WITH THE COURT TRIAL OF 5/25/99 IN FAVOR OF DEFENDANT FISH & WILDLIFE AND BUREAU OF RECLAMATION AND AGAINST PLAINTIFF ON DISPARATE IMPACT CASE.

Jack L. Wagner
Clerk of the Court

ENTERED: May 26, 1999

by: s/
C HUTCHINSON, Deputy Clerk

App. 2

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. CASE NUMBER: CIV S-95-643 WBS

BRUCE BABBITT

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT ENTERED IN ACCORDANCE WITH THE COURT TRIAL OF 5/25/99 IN FAVOR OF DEFENDANT FISH & WILDLIFE ON PLAINTIFF'S AGE DISCRIMINATION CLAIM.

Jack L. Wagner
Clerk of the Court

ENTERED: May 26, 1999

by: s/
C HUTCHINSON, Deputy Clerk

App. 3

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. **CASE NUMBER: CIV S-95-643 WBS GGH**

BRUCE BABBITT, Secretary, Dept of Interior

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 2, 1999.

Jack L. Wagner
Clerk of the Court

ENTERED: July 2, 1999

by: s/
K. Heiser, Deputy Clerk

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. **CASE NUMBER: CIV S-95-643 WBS GGH**

BRUCE BABBITT, Secretary, Dept of Interior

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 2, 1999.

Jack L. Wagner
Clerk of the Court

ENTERED: July 2, 1999

by: s/
K. Heiser, Deputy Clerk

FILED
JUL - 2 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLARD JENKINS, SR

Plaintiff, CIVIL NO: CIV S-95-0643 WBS/GGH

v.

DEFENDANT'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

BRUCE BABBITT, Secretary,

Trial Date: May 18, 1999

Defendant.

In this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et. seq.*, plaintiff Willard Jenkins, Sr. ("Jenkins"), challenges his nonselection for two positions: (1) Computer Specialist, GS-11, with the Fish and Wildlife Services ("F&WS") and (2) ("Reclamation"). With respect to his

nonselection for both positions, Jenkins claims that he was intentionally discriminated against on the basis of his race, his national origin, and his color. Additionally, Jenkins claims that he was nonselected for the computer specialist position in retaliation for submitting a claim of discrimination in connection with is nonselection for the supply clerk position and based on his age.

In addition to the foregoing disparate treatment claims, Jenkins also seeks relief for two disparate impact claims based on Jenkins' race.

From May 18-21, 1999, Jenkins, claims against the Fish and Wildlife Service for retaliation and discrimination based on his race, national origin and color were tried to a jury. On May 21, 1999, the jury returned a verdict in favor of defendant on each of these four claims. On May 26, 1999, judgement was entered as to those claims, and amended on June 22, 1999.

Jenkins' claims of disparate impact as to both the Fish and Wildlife Service and the Bureau of Reclamation, his claim of age discrimination as to the Fish and Wildlife Service, and his claime of discrimination based on race,

national origin and color as to the Breau of Reclamation were tried to the Court. On May 24, 1999, trial commenced on these claims and ended on June 22, 1999.

Throughout trial in this matter, plaintiff represented himself; defendant was represented by Debora G. Luther of the United States Attorney's Office.

Having considered the testimony, exhibits, briefs, and arguments of the parties, the Court makes the following findings of fact and conclusions of law in accordance with Fed.R.Civ.P 52(a):

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FINDINGS OF FACT

A. Facts Common to All Claims

1. Willard Jenkins, Sr., is a black person of African-American descent who was born in Louisiana in 1940.

2. In 1980, Jenkins received an honorable discharge and retired from the United States Air Force after 20 years of military service.

B. Age Discrimination and Disparate Impact Claims, Computer Specialist Position (Fish and Wildlife Service)

1. In 1990, Jenkins submitted a federal employment application, called an "SF-171", the Office of Personnel Management ("OPM"). This application was reviewed by OPM and, based upon the information reported therein by Jenkins, he was determined to be qualified for the position of computer specialist, GS-11. For the position of computer specialist, Jenkins' application was given a rating of 108.7 by OPM.

2. Plaintiff called Jill Hansen as his witness. Ms. Hansen testified that she has worked for OPM for 17 years, most of those years as a staffing specialist. She credibly explained that many, if not all, federal agencies have their own separate and independent personnel offices and that OPM serves a specialized personnel agency for certain federal civilian employment functions. For example, Ms.

Hansen explained that OPM is charged with administering examinations for various government positions, such as clerical positions; assisting agencies in filling certain hard-to-find jobs, such as the computer specialist position at issue herein; and providing consulting services to various governmental agencies.

3. Ms. Hansen also explained that in her own position of staffing specialist, she is responsible for reviewing the applications submitted by individuals who are interested in federal civilian employment to determine if the individuals are qualified for the positions in which they are interested and/or to determine what positions the individuals do qualify for. She explained that OPM rates the applications on a scale of up to 100 points, 100 meaning highly qualified. She further explained that applicants can be eligible to have additional points added to their rating based on their military service. She emphasized that OPM does no background investigation to determine the accuracy of the information submitted by the applicants; the rating presumes that the information provided is truthful and is attested to by the applicant's signature on the government's application form.

4. Ms. Hanses identified Defendant's Exhibit A as a request in 1992 from F&WS' personnel office in Portland, Oregon, for assistance in filling a computer specialist

position in Sacramento. In response to the request the F&WS, OPM forwarded Jenkins' application, along with other applications of qualified individuals, to F&WS' Portland personnel office ("F*WS Portland").

5. Ms. Hansen further credibly explained when selecting officials have received a package of qualified applications from OPM and have received a package of qualified applications through the agency's own internal recruitment process, they are not required to consider the applications received from OPM and, in fact, they may return the OPM applications without even looking at any of them. The only restriction imposed on selecting officials is that they may not refuse to consider applicants referred by OPM based on any impermissible discriminatory basis, i.e., race, religion, gender, age, etc.

6. Mr. Jenkins testified that at or about the same time that the F&WS requested applications from OPM, the F&WS also advertised the computer specialist position internally, that is, in federal government offices. He further testified that F&WS received a number of applications through this internal recruitment process. In support of his testimony, Mr. Jenkins offered the compete administrative investigation of his discrimination complaint along with the sworn deposition transcript of James J. McKevitt, together with all exhibits thereto, and he testified that Mr. Mckevitt

was the selecting official for the computer specialist position. The court received into evidence the entire administrative investigation along with the deposition transcript, including exhibits, as Plaintiff's Exhibits 34 and 54, respectively.

7. On cross examination of Mr. Jenkins, the government introduced into evidence the F&WS' decision on his discrimination complaint, which adopted the recommended decision of the administrative judge ("AJ") who presided over the hearing held in response to Mr. Jenkins' complaint. The court received into evidence both of these proffered exhibits as Defendant's Exhibits G and F, respectively. The AJ recommended findings of nondiscrimination, and his recommendation was adopted by the agency.

8. The court finds that the evidence produced demonstrates that the government selected someone other than Mr. Jenkins based on the selectee's qualifications for the position. The court likewise finds from the evidence submitted that the selecting official determined that he would make his selection from the package of applications received through the agency's internal recruitment efforts and that he returned the OPM package of applications without conducting any interviews of the OPM-referred applicants. Mr. Jenkins failed to present any crediable

evidence to show that the selecting officials's decision to return the OPM package of applications was in any way predicted on Mr. Jenkins' age.

9. I find that Mr. Jenkins was approximately 52 years old at the time of the selection for the computer specialist position. However, no credible evidence was presented that refuted the agency's articulated legitimate, nondiscriminatory reasons for its selection decision and no credible evidence was presented of any intentional discrimination against Mr. Jenkins on the basis of his age.

10. Although Mr. Jenkins expressed his opinion that the selectee was not qualified for the computer specialist position, I find that the selectee was qualified. Mr. Jenkins did not offer any evidence to support his opinion that hte selectee was unqualified for the position. I further find that Jenkins failed to prove that he was more qualified than the selectee. On cross examination, Mr. Jenkins admitted that he failed to maintain a satisfactory grade point average in his computer science major while enrolled at National University from 1987 to 1989. Mr. Jenkins further admitted that, because of his poor performance, he was then barred from attending National University at the end of 1989.

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11. Mr. Jenkins claimed that the subjective manner in which the position was filled resulted in an adverse impact against black applicants. He submitted no statistical evidence of this alleged impact in support of his claim.

C. Disparate Impact, Race, National Origin, and Color Claims, Supply Clerk (Bureau of Reclamation)

1. In 1991, Jenkins submitted an application directly to the Bureau of Reclamation for the vacant position of supply clerk, GS-5, in Folsom California.

2. The personnel office for the Bureau of Reclamation with authority over the Folsom office is located in Sacramento. That personnel office reviewed Jenkins' application, determined that he met the minimum qualifications for the supply clerk position, and forwarded Jenkins' application to the selecting official along with the applications of other qualified applicants, including Dan Aslin who was selected for the position.

3. Mr. Jenkins testified that the selecting official was Dean Malone and that he interviewed several of the applicants, including Mr. Jenkins. Mr. Jenkins testified that he believes Mr. Malone assigned points to the answers given to the interview questions by the applicants.

4. Mr. Jenkins claimed that the selection process

utilized by Reclamation was subjective and resulted in actual discrimination against black applicants. Mr. Jenkins failed to identify what factially neutral agency policy caused the alleged disparate impact. Moreover, Mr. Jenkins submitted no statistical evidence whatsoever supporting any disparate impact on black applicants.

5. Mr. Jenkins also testified that Reclamation had a policy of continuously rejecting his application, such that he had a continuing violation and that that policy adversely impacted black applicants. Mr. Jenkins submitted a list of positions for which he had applied at Reclamation and testified that he had been rejected. The court received this list, plaintiff's Exhibit 106, into evidence. No pattern can be discerned from this list nor is it evident that a continuing violation occurred inasmuch as Mr. Jenkins does not appear to be qualified for such positions as a Water Rights Specialist. Even assuming that he was qualified for these positions, Mr. Jenkins failed to submit any statistical evidence whatsoever supporting his conclusion of disparate impact.

6. The selecting official, Dean Malone, testified. I observed his demeanor and found him to be a credible witness. He testified that for approximately a year preceding his selection for the vacant supply clerk position,

the Folsom office had been understaffed. He testified that the supply clerks had fallen behind in their work and management had expressed dissatisfaction with the supply operations.

7. Mr. Malone also testified credibly that when he conducted the interviews, he asked each of the witnesses the same questions and he gave points, ranging from "1" for a poor answer to "10" for an excellent anser, to their response to each question. He testified that Mr. Aslin received a score of 239 for his interview and Mr. Jenkins received a score of 213.

8. Mr. Malone further testified that he selected Mr. Aslin for the supply clerk position because Mr. Alsin had received the highest, overall score for his interview. In particular, Mr. Malone
testified repeatedly that at the time of his selection Mr. Aslin was employed as a supply clerk with the Bureau of Reclamation in its regional warehouse in Sacramento and knew the forms and procedures utilized by the Bureau in its supply operations.

9. Mr. Jenkins did not offer any evidence that demonstrated intentional discrimination or pretext by the agency.

CONCLUSION OF LAW

1. The Court has jurisdiction pursuant to 42 U.S.C. § 2000e- 5(f), -16(c) and (d), and 29 U.S.C. § 633a.

2. Title VII, 42 U.S.C. § 2000e *et seq.*, makes it unlawful for a federal employer to engage in employment discrimination on account of, among other things, an individual's race, national origin, color, or past EEO activity. 42 U.S.C. § 2000e-16(1).

3. The Age Discrimination in Employment Act, 29 U. S.C. § 621 *et seq.*, makes it unlawful for a federal employer to engage in employment discrimination on account of an individual's age.

4. In determining whether an employer has unlawfully and intentionally discriminated against an employee based upon his or her age, race, national origin, or color, courts have traditionally followed the disparate treatment analysis set forth in McDonnell Douglass Corp. v. Green, 411 U.S. 792, 801 (1973), and refined by Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), and Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993). The Court in Burdine summarized this framework as follows:

/ / /

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U. S. at 252-53.

5. A plaintiff meets his/her *prima facie* burden of intentional (disparate treatment) discrimination by showing:

(1) S/he is a member of a protected class;

(2) S/he was qualified for the position s/he applied for;

(3) That s/he was not selected for the position; and

(4) Someone not of the protected class was selected for the position.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973);

Palmer v. United States, 794 F.2d 534, 537 (9th Cir. 1986).

6. The disparate impact theory examines a facially-neutral employment practice or policy in light of its effect or "impact" upon a protected class of employees or applicants for employment. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). For a disparate impact claim, plaintiff must

establish his *prima facie* case by:

> (1) identify[ing] the specific employment practices or selection criteria being challenged; (2) show[ing] disparate impact; and (3) prov[ing] causation; "that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs . . .because of their membership in a protected group."

Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir.1990) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 108 S.Ct. 2777, 2788-89 (1988)). In contrast to the *prima facie* burden for a disparate treatment claim, plaintiff's *prima facie* burden in a disparate impact case requires that the plaintiff to "actually prove the discriminatory impact at issue". Garcia v. Spun Steak Company, 998 F.2d 1480, 1486 (9th Cir. 1993) (quoting Rose, 902 F.2d at 1421), *cert.denied*, 512 U.S. 1228 (1994).

7. Turning first to Jenkins' age discrimination claim, Mr. Jenkins satisfies his *prima facie* burden.

8. As shown in the administrative record (Pltf's Exh. 34) as well as the deposition of James J. McKevitt (Pltf's Exh 54), the F&WS articulated legitimate, nondiscriminatory reasons for selecting the selectee for the computer specialist position. Plaintiff failed to meet his burden of proving that the agency's articulated reasons were pretextual or intentionally discriminatory on the basis of his age. Having

heard all of the evidence, Mr. Jenkins has failed to satisfy the Court that it is more likely than not that his age was the true reason for his nonselection for this position.

9. Turning now to plaintiff's disparate impact claims, Mr. Jenkins failed to meet his *prima facie* burden. With respect to his claim against F&WS, Mr. Jenkins failed to identify any facially neutral agency policy as responsible for any alleged disparate impact. With respect to his claims against both F&WS and Reclamation, Mr. Jenkins utterly failed to present any statistical evidence to show that any challenged practices have caused any statistically significant racial disparity in the workforce as compared with the relevant market.

10. Finally, as to plaintiff's color, national origin and race claims against Reclamation, Mr. Jenkins met his *prima facie* burden. In response the government articulated legitimate, nondiscriminatory reasons for selecting Mr. Aslin for the supply clerk position rather than Mr. Jenkins. At the time of his selection, Mr. Aslin was working for the Reclamation as a supply clerk, he had knowledge of the agency's supply forms and procedures, and essentially knew how to do the job. Mr. Jenkins did not have this experience. Having heard all of the evidence, Mr. Jenkins has failed to satisfy the Court that it is more likely than not

that his race or his color or his national origin were the true reason for his nonselection for this position.

ORDER

THEREFORE, the Court orders that judgement be entered in favor of defendant and against the plaintiff on his claims of
(1) discrimination on the basis of age with respect to the computer specialist position with the Fish and Wildlife Service,
(2) disparate impact as to the computer specialist position with the Fish and Wildlife Service and as to the supply clerk position with the Bureau of Reclamation, and
(3) discrimination on the basis of race, color, or national origin with respect to the supply clerk position with the Bureau of Reclamation. Costs are awarded to the defendant.

IT IS SO ORDERED.
DATED: 7/1/99

s/
WILLIAM B. SHUBB
CHIEF JUDGE
UNITED STATES DISTRICT COURT

App. 21

FILED
JUL 14 1999
CLERK, US. DISTRICT CURT
EASTERN DISTRICT CALIFORNIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

WILLARD JENKINS,

Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Defendant.

NO. CIV. S-95-0643 WBS\GGH

ORDER

----oo0oo----

Plaintiff appears to move for reconsideration of the court's findings and conclusions filed July 2, 1999, and the judgment thereon. (See Judgment In A Civil Case filed July 2, 1999, and Findings and Conclusions filed July 2, 1999). The Court, having read and considered the motion, denies it.

IT IS SO ORDERED.

DATED: July 13, 1999

s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

BEST AVAILABLE COPY

FILED
JUL 30 1999

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. CASE NUMBER: CIV S-95-643 WBS DAD

BRUCE BABBITT

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF OF 5/20/97 IN FAVOR OF DEFENDANT ON JENKINS' CLAIMS OF SEX DISCRIMINATION, AGE DISCRIMINATION, VRA/VPA AND UNLAWFUL RETALIATION.

Jack L. Wagner
Clerk of the Court

ENTERED: July 30, 1999

by: s/
C HUTCHINSON, Deputy Clerk

FILED
JUL 30 1999

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

WILLARD JENKINS, SR

v. CASE NUMBER: CIV S-95-643 WBS DAD

BRUCE BABBITT

XX - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 10/26/95 IN FAVOR OF DEFENDANT ON JENKINS' REHABILITATION ACT CLAIM, VETERANS READJUSTMENT ACT/VETERANS PREFERENCE ACT CLAIM, AND DUE PROCESS VIOLATION CLAIM.

Jack L. Wagner
Clerk of the Court

ENTERED: July 30, 1999

by: s/
C HUTCHINSON, Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR., Plaintiff-Appellant, v. BRUCE BABBITT, Secretary of the Department of Interior, Defendant-Appellee.

No. 99-16720
D.C. No. CV-95-00643-WBS Eastern California (Sacramento)

WILLARD JENKINS, SR., Plaintiff-Appellant, v. BRUCE BABBITT, Secretary of the Department of Interior, Defendant-Appellee.

No. 99-16724
D.C. No. CV-95-00643-WBS Eastern California (Sacramento)
ORDER

These two appeals are hereby consolidated.

The briefing schedule established in appeal number 99-16720 shall continue to govern these consolidated appeals.

For the Court:
CATHY A. CATTERSON
Clerk of the Court
s/
Corina Orozco
Deputy Clerk
Local Rule 27-7

FILED
AUG 20 1999

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

---oo0oo---

WILLARD JENKINS,

Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR,

Defendant.

NO. CIV. S-95-0643 WBS\GGH

ORDER

---oo0oo---

Plaintiff, proceeding *pro se* and *in forma pauperis,* has appealed to the Ninth Circuit. Defendant moves to compel plaintiff to order and pay for the cost of a transcript of the Record. Fed. R. App. P. 10. This court granted plaintiff initial permission to proceed *in forma pauperis.* The Administrative office of the courts will pay for the transcripts of an *in forma pauperis* party on appeal, but only if the district court certifies that (a) the appeal is neither frivolous nor in bad faith and (b) that the portion of the transcript requested is necessary to the appeal. 28 U.S.C. § § 753(f), 1915(c). Pursuant to 29 U.S.C. § 1915(c), this court has already certified to the Ninth Circuit that plaintiff has taken his appeal in bad faith. Moreover, considering plaintiff's trial testimony and the Declarations

submitted by the United States considering plaintiff's assets and income, the court has grave doubts that plaintiff is still entitled to proceed any further *in forma pauperis*. Plaintiff's request that the government pay for his trial transcripts will therefore be denied.[1]

Plaintiff filed the required "Transcript Designation and Ordering Form" on July 26, 1999, following his notice of appeal from the entry of judgment on the bench trial. That form would therefore appear to be late with respect to plaintiff's initial appeal from the entry of judgment on the jury verdict, filed on June 4, 1999. It is not the place of this court, however, to police the jurisdiction of the Ninth Circuit. This court has only one role under Fed. R. App. P. 10: it can order plaintiff to request those parts of the record needed by defendant to defend the appeal. Here, although plaintiff has requested trial transcripts for only three of the trial days, the defendant represents that it needs the transcripts of the entire trial to defend the appeal.[2]

IT IS THEREFORE ORDERED that defendant's motion

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[1] Plaintiff also has requested that the court "waive" his liability for the cost of bill; the court reminds plaintiff that his *in forma pauperis* status does not relieve him of the obligation to pay costs. 28U.S.C. § 1915(f) (1); Cherry v. Champion Int'l Corp., —F.3d—, 1999 WL 543225, *4 (4th Cir. July 27).

[2] The government filed its motion more than ten days after plaintiff filed his designation. Plaintiff, however, apparently never served the designation on defendant, thus excusing the delay. Fed. R. App. P. 10(b) (2) (A).

to compel plaintiff to order and pay for the entire trial transcript be, and the same hereby is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for a waiver of the taxation of costs be, and the same hereby is DENIED.

DATED: August 19, 1999

s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

FILED
SEPT 16 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR.,	Nos. 99-16571 99-16573
Plaintiff-Appellant,	99-16575
v.	D.C. No. CV-95-00643-WBS Eastern California (Sacramento)
BRUCE BABBITT, Secretary of the Department of Interior,	
Defendant-Appellee.	ORDER

Before: FERNANDEZ, TASHIMA and GRABER, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over these appeals because the order challenged in these appeals is not final or appealable. See Fed. R. Civ. P. 54(b); Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgement is entered in compliance with rule). Consequently, this appeal is dismissed for lack of jurisdiction. All pending motions are denied as moot.

FILED

OCT 22 1999

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR., No. 99-16720

Plaintiff-Appellant, D.C. No. CV-95-00643-WBS
v. Eastern California
(Sacramento)

BRUCE BABBITT, Secretary of the Department of Interior,
Defendant-Appellee.

WILLARD JENKINS, SR., No. 99-16724

Plaintiff-Appellant, D.C. No. CV-95-00643-
WBS v. Eastern California
(Sacramento)

BRUCE BABBITT, Secretary of the Department of Interior, ORDER
Defendant-Appellee.

Court Reporter Kelly O'Halloran's motion for an extension of time to file the transcript is granted. The transcript is due February 14, 2000.

This order waives the mandatory fee reduction provided that the transcripts are filed within the time allowed in this order.

The briefing schedule is as follows: the opening brief and excerpts of record are due March 27, 2000, the answering brief is Nos 99-16720 and 99-16724 due April 26, 2000, and

the optional reply brief is due 14 days from service of the answering brief.

A copy of this order shall be provided to the court reporter at the district court.

Court records do not reflect appellant has paid the docket fees in No. 99-16724. No. 99-16724 is therefore dismissed under Ninth Circuit Rule 42-1.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

For the Court:

CATHY A. CATTERSON

s/

Cathie A. Gottlieb
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

App 31

FILED
DEC 20 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR.,

Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary of the Department of Interior,

Defendant-Appellee.

No. 99-16720
99-16724

D.C. No. CV-95-00643-WBS Eastern California (Sacramento)

ORDER

Before: LEAVY and SILVERMAN, Circuit Judges

Appellee's motion to dismiss the appeal is denied.

The district court has certified that these appeals are not taken in good faith, and so his revoked appellant's *in forma pauperis* status for these appeals.

See 28 U.S.C. § 1915(a).

Accordingly, within 14 days of the date of this order, appellant shall pay 4105.00 to the district court as the docketing and filing fees for each of these appeals and file proof of payment with this court. Failure to pay the fees will result in dismissal of these appeals by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

99-16720, 99-16724.

No motions for reconsideration, clarification, or modification of the denial of appellant's *in forma pauperis* status shall be filed or entertained.

Appellant's motion for appointment of counsel is denied. *See Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301, 1318 (9th Cir. 1981); *see also Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986). No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained.

Appellant's motion for transcript at government expense is denied. *See* 28 U.S.C § 753(f); *Henderson v. United States*, 734 F.2d 483 (9th Cir. 1984).

If appellant pays the fees as required and files proof of such payment in this court, within 14 days of the date of this order, appellant shall pay for the reporter's transcripts. The transcripts will be due February 2, 2000. Appellant may, by March 15, 2000, file a replacement opening brief; the consolidated answering brief will be due April 15, 2000; and the optional consolidated reply brief will be due within 14 days after service of the answering brief.

The Clerk shall serve this order on the court reporter supervisor in the district

FILED
FEB 16 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR.,

Plaintiff-Appellant,

WBS v.

BRUCE BABBITT, Secretary of the Department of Interior,

Defendant-Appellee.

No. 99-16720

D.C. No. CV-95-00643-Eastern California (Sacramento)

WILLARD JENKINS, SR.,

Plaintiff-Appellant,

WBS v.

BRUCE BABBITT, Secretary of the Department of Interior,

Defendant-Appellee.

No. 99-16724

D.C. No. CV-95-00643-Eastern California (Sacramento)

ORDER

Court Reporter Kelly O'Halloran's motion for an extension of time to file the transcript is granted. The transcript is due February 14, 2000.

This order waives the mandatory fee reduction provided that the transcripts are filed within the time allowed in this order.

The briefing schedule is as follows: the opening brief

March 27, 2000, the answering brief is due April 26, 2000, and the optional reply brief is due 14 days from service for answering brief.

A copy of this order shall be provided to the court reporter at the district court.

Court records do not reflect appellant has paid the docket fees in No. 99-16724. No. 99-16724 is therefore dismissed under Ninth Circuit Rule 42-1.

A certified copy of this order sent to the district court shall act as and for the mandate of this court

For the Court:

CATHY A. CATTERSON
Clerk of the Court
Deputy Clerk
Ninth Cir. R. 27-7/ Appendix a,
General Orders for the
United States Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR., No. 99-16720

Plaintiff-Appellant, D.C. No. CV-95-00643-WBS

v.

MEMORANDUM[1]

BRUCE BABBITT, Secretary of the Department of Interior,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
William b. Shubb, District Judge, Presiding

Submitted January 8, 2001[2]

Before: BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

Willard Jenkins, Sr. appeals pro se the district court's

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

entry judgement for the Secretary of the Department of Interior ("Secretary") following a bench trial in his employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § ("ADEA").[3] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review for clear error a judge's findings in a bench trial. *See FDIC v. Craft*, 157 F.3d 697, 701 (9th Cir. 1998). Because Jenkins failed to rebut the Secretary's evidence of a legitimate nondiscriminatory reason for its hiring decision, the district court properly found in favor of the Secretary on the disparate treatment and age discrimination claims. *See Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672-74 (9th Cir. 1988). Because Jenkins failed to present evidence of a policy or pattern of discriminatory hiring, the district court did not err by rendering judgment in favor of the Secretary on the disparate impact claims. *See Wards Cover Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989).

Jenkins' remaining contentions lack merit. We have not considered issues raised for the first time in Jenkins' reply brief. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990). We grant Jenkins' motion to include additional excerpts of record; we have considered the excerpts in concluding this appeal.

AFFIRMED.

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[3] By order of February 16, 2000, this court dismissed the previously consolidated appeal number 99-16724 for failure to pay the docket fees. We have not considered any issues raised in the parties' briefs that address the jury verdict at issue in that appeal.

FILED

APR 2 2001

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLARD JENKINS, SR.,

Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary of the Department of Interior,

Defendant-Appellee.

No. 99-16720

D.C. No. CV-95-00643-WBS Eastern California (Sacramento)

ORDER

Before: BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

Appellant's petition for panel rehearing is denied. No further filings shall be accepted in this closed appeal